

Law Office of Nora J. Chorover

nchorover@choroverlaw.com

March 31, 2016

RECEIVED
APR - 4 2016
OFFICE OF THE REGIONAL ADMINISTRATOR

BY CERTIFIED MAIL

Curt Spalding, Regional Administrator
EPA New England, Region 1,
5 Post Office Square - Suite 100
Boston, MA 02109-3912
Certified # 7014 3490 0000 7429 8831

Gina McCarthy, Administrator
US EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
Certified # 7014 3490 0000 7429 8855

Citizen Suit Coordinator
Environment and Natural Resources
Division
Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044-7415
Certified # 7014 3490 0000 7429 8848

Re: Notice of Execution of Consent Decree in
Clean Water Action v. Bond Construction Corporation;
Case No. 1:15-cv-13164-WGY

Dear Sirs/Madams:

Enclosed pursuant to 40 CFR 135.4 please find an executed copy of the parties' proposed Consent Decree resolving the above caption brought under the citizen suit provision of the Clean Water Act. We have informed the Court of the parties' settlement and of the statutory requirement of 45 days' notice to the United States prior to entry of any Consent Decree. Please feel free to call me if you have any questions about the enclosed. Thank you.

Sincerely,



Nora J. Chorover

Enclosure

cc: Christopher B. Myhrum, Esq. (by email)

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

CLEAN WATER ACTION,

Plaintiff,

v.

BOND CONSTRUCTION
CORPORATION,

Defendant.

Case No.: 1:15-cv-13164-WGY

PROPOSED CONSENT DECREE

WHEREAS, plaintiff Clean Water Action (“Clean Water Action”) is a nationwide non-profit organization working for prevention of pollution in the nation’s waters;

WHEREAS, defendant BOND CONSTRUCTION CORPORATION (“BOND”) operates a mineral mining and dressing facility at 98 North Spencer Road, Spencer, Massachusetts that is the subject of this lawsuit (the “Facility”);

WHEREAS, Clean Water Action alleges that stormwater from the Facility discharges to the Seven Mile River and adjacent wetlands and waterways and that these stormwater discharges are regulated pursuant to the federal Clean Water Act (the “Act”) and covered by the Final National Pollutant Discharge Elimination System (“NPDES”) Multi-Sector General Permit issued by the United States Environmental Protection Agency (the “Storm Water Permit”). *See* 33 U.S.C. §§ 1311(a), 1342(a), 1342(p); 65 Fed. Reg. 64746 (Oct. 30, 2000); 73 Fed. Reg. 56572 (Sept. 29, 2008); 80 Fed. Reg. 34403 (June 4, 2015);

WHEREAS, Bond denies the allegations of Clean Water Action that stormwater from the Facility discharges to the Seven Mile River and adjacent wetlands and waterways, that Facility

stormwater is regulated pursuant to the federal Clean Water Act and that Bond has violated the Storm Water Permit or the Act;

WHEREAS, on May 27, 2015, Clean Water Action provided notice of alleged violations of the Act, and of Clean Water Action's intention to file suit against Bond, to the Administrator of the United States Environmental Protection Agency ("EPA"); the Administrator of EPA Region I; the Massachusetts Department of Environmental Protection; and to Bond, pursuant to Section 505 of the Act, 33 U.S.C. § 1365;

WHEREAS, the parties have decided that it is in their best interests to resolve the litigation by agreement without adjudication of any fact, allegation, or law; and

WHEREAS, this Consent Decree ("Consent Decree") shall be submitted to the United States Department of Justice and the Environmental Protection Agency for the forty-five (45) day statutory review period pursuant to 33 U.S.C. § 1365(c).

NOW THEREFORE IT IS HEREBY STIPULATED BETWEEN THE SETTLING PARTIES, AND ORDERED AND DECREED BY THE COURT, AS FOLLOWS:

INJUNCTIVE RELIEF

1. Bond agrees to operate the Facility in compliance with the applicable requirements of the Clean Water Act, including any changes to the Act that may be made during the term of this Consent Decree.
2. By no later than May 1, 2016, Bond will eliminate potential migration of industrial materials or overland stormwater runoff from materials and material piles located in its material storage area on the northwest side of the Facility into adjacent wetlands or the Seven Mile River.
3. By no later than May 1, 2016 and as may be necessary and appropriate, Bond will make improvements to berms at the Facility to control erosion or sedimentation into adjacent wetlands or the Seven Mile River.

4. Involvement by Clean Water Action.

a. Bond shall permit representatives of Clean Water Action to perform up to two site visit to the Facility during normal daylight business hours following the Effective Date of this Consent Decree, provided that Clean Water Action notifies Bond in writing at least ten (10) business days in advance of any such site visit. The first site visit shall occur sometime between May 15, 2016 and June 30, 2016. The second site visit shall occur sometime between March 22, 2017 and June 21, 2017.

b. Prior to performing site visits, each representative of Clean Water Action entering upon the Facility shall execute a Waiver, Release and Indemnity Agreement:

i. Acknowledging Bond Facility operations are subject to the regulations of the Mine Safety and Health Administration, and involve heavy machinery and vehicles and potentially dangerous activities presenting personal injury and property damage risks;

ii. Waiving any and all claims against Bond and releasing Bond of and from any and all liabilities, claims or causes of action of whatever name or nature, whether at law or in equity, for personal injury or property damage in any way arising out of, related to or connected with entry upon and monitoring of the Bond Facility, excepting personal injury or property damage caused by Bond's intentional or reckless conduct;

iii. Holding harmless and indemnifying Bond from and against any loss, harm or damage and litigation costs, including experts' and attorneys' fees, that Bond incurs due to damage or harm to the signatory's person or personal property as a result of or in connection with his or her access to and monitoring of the Bond Facility, excepting personal injury or property damage caused by Bond's intentional or reckless conduct; and

iv. Confirming legal age, capacity and authority, opportunity to seek advice of legal counsel concerning terms and conditions, and execution without duress.

c. For the term of this Decree, Bond shall provide Clean Water Action with copies of all documents Bond submits to EPA, the Commonwealth of Massachusetts and/or the Town of Spencer concerning the Facility's stormwater discharges or the Massachusetts Wetlands Protection Act. Such documents and reports shall be submitted contemporaneously with their submission to the governmental entity by emailing them to compliance@cleanwater.org and nchorover@choroverlaw.com.

PAYMENT, FEES AND COSTS

5. Within 15 days after the Effective Date, Bond shall pay the sum of \$30,000.00 (the "Payment") by check or money order, made out to Law Office of Christopher B. Myhrum IOLTA Account, delivered by certified mail, return receipt requested, or by nationally recognized overnight delivery company, addressed to Christopher B. Myhrum, Trustee, Law Office of Christopher B. Myhrum, 1500 Main Street, P.O. Box 15407, Springfield, MA 01115-5407, for distribution in accordance with the following terms:

a. The full Payment shall be made to the Town of Spencer, Massachusetts, Conservation Commission, a body politic within the municipality of the Town of Spencer, Massachusetts within seven days of receipt of written notice that the Town of Spencer has been awarded a grant under either the federal Clean Water Action Section 604(b) for water quality assessment and management planning or a grant under Section 319 of the Act for the prevention, control and abatement of nonpoint source pollution (the "Town Notice"). A copy of such payment shall be sent simultaneously to Clean Water Action. The payment shall be delivered by certified mail, return receipt requested, or by nationally recognized overnight delivery company, to: Steven J. Tyler, PE, Superintendent, Town of Spencer Water Department, 3 Old Meadow Road, Spencer, MA 01562. Payment must be used by the Town in full as matching funds for such grant(s).

b. If Town Notice is not provided on or before September 1, 2017, or if the Section 604(b) and/or 319 grants awarded to the Town between now and the date of the Town Notice total(s) less than the full \$30,000, or if Town of Spencer declines or otherwise does not accept some or all of the Payment, then the remaining portion of the Payment shall be delivered by October 1, 2017 to the Massachusetts Natural Resource Damage Trust for the purposes of funding projects to protect water quality in the vicinity of the Seven Mile River Watershed. Payment shall be delivered by certified mail, return receipt requested, or by nationally recognized overnight delivery company to: Karen Pelto, Natural Resource Damages Program Coordinator, Natural Resources Damages Trust, Department of Environmental Protection, One Winter Street, Boston, MA 02108. Evidence of such payment shall be provided to Clean Water Action.

c. The Payment or any portion thereof shall not be disbursed or otherwise granted directly or indirectly to Clean Water Action.

6. Within 15 days after the Effective Date of this Consent Decree, Bond shall reimburse Clean Water Action in the amount of \$52,000 to defray Clean Water Action's investigation fees and costs, expert fees and costs, and attorneys' fees incurred up to the date of entry of this Consent Decree. Payments shall be made by check or money order, made out to Law Office of Nora J. Chorover, Client Trust Account, and be delivered by certified mail, return receipt requested, or by nationally recognized overnight delivery company, to Nora J. Chorover, Law Office of Nora J. Chorover, 11 Green Street, Boston, MA 02130.

7. Within 15 days after the Effective Date of this Consent Decree, Bond shall pay to Clean Water Action \$4,000 to be placed in the Client Trust Account held for its benefit by Law Office of Nora J. Chorover, to be used to reimburse Clean Water Action for reasonable fees and costs incurred to monitor Bond's compliance with this Consent Decree for a term of two years after

the Effective Date of this Consent Decree. Payment shall be made by check or money order, made out to Law Office of Nora J. Chorover, Client Trust Account, and be delivered by certified mail, return receipt requested, or by nationally recognized overnight delivery company, to Law Office of Nora J. Chorover, 11 Green Street, Boston, MA 02130. Nothing in this paragraph or in this Consent Decree shall restrict Clean Water Action's right to seek additional compensation for fees or costs that it incurs to enforce Bond's compliance with the terms of this Consent Decree, and nothing herein shall be construed as a waiver of Bond's right to contest any such action.

EFFECTIVE DATE OF CONSENT DECREE

8. The parties recognize that, pursuant to 33 U.S.C. § 1365(c)(3), this Consent Decree cannot be entered until forty-five (45) days after the receipt of a copy of the proposed Consent Decree by the United States Attorney General and EPA. Therefore, upon signing of this Consent Decree by the parties, Clean Water Action shall serve, or cause to be served, copies of this Consent Decree upon the EPA Administrator, the Regional EPA Administrator, and the Attorney General for review, as required by 40 C.F.R. § 135.5. Upon the expiration of the forty-five (45) day review period provided by 33 U.S.C. § 1365(c)(3), the parties will jointly move the Court for entry of this Consent. The date that the Court enters this Consent Decree is the Effective Date of this Consent Decree.

RELEASE

9. Upon the Effective Date of this Consent Decree, Clean Water Action, on its own behalf and on behalf of its members, parents, subsidiaries, affiliates, successors, assigns, directors, officers, agents, attorneys, representatives, and employees, releases Bond and all its managers, members, parents, subsidiaries, affiliates, directors, officers, agents, attorneys, representatives, employees, predecessors in interest in or title to the Facility, successors, and assigns from, and waives forever all claims, whether known or unknown, for damages, penalties, fines, sanctions,

mitigation, fees (including fees of attorneys, experts, and others), costs, expenses or any other sum incurred or claimed or which could have been claimed in this Action, for the alleged failure to comply with the Act and the Storm Water Permit at the Facility, up to and including the date this Consent Decree is executed by the parties. Clean Water Action does not release any claims to enforce any term of this Consent Decree. Clean Water Action does not release any claims for violations of the Storm Water Permit or the Act that may occur or continue after the date this Consent Decree is executed by the parties.

10. Bond, on its own behalf and on behalf of its parents, subsidiaries, affiliates, predecessors in interest in or title to the Facility, successors, assigns, directors, officers, agents, attorneys, representatives, and employees, releases Clean Water Action and its members, subsidiaries, affiliates, successors, assigns, directors, officers, agents, attorneys, representatives, and employees from, and waives forever all claims, whether known or unknown, which arise from or pertain to this Action, including all claims for fees (including fees of attorneys, experts, and others), costs, expenses or any other sum incurred or claimed or which could have been claimed for matters associated with or related to this Action up to and including the date this Consent Decree is executed by the parties. Bond does not release any claims to enforce any term of this Consent Decree. Bond does not release any claims for activities or events that may occur or continue after the date this Consent Decree is executed by the parties.

DISPUTE RESOLUTION

11. If a dispute under this Consent Decree arises, or either party believes that a breach of this Consent Agreement has occurred, the parties shall meet and confer within fourteen (14) calendar days of receiving written notification from the other party of a request for a meeting to determine whether a violation has occurred and to develop a mutually agreed upon plan, including implementation dates, to resolve the dispute. If the parties fail to meet and confer, or the meet-

and-confer does not resolve the issue, after at least seven (7) days have passed after the meet-and-confer occurred or should have occurred, either party shall be entitled to all rights and remedies under the law, including filing a motion with the District Court of Massachusetts, which shall retain jurisdiction over this matter for the limited purposes of enforcement of the terms of this Consent Decree and in accordance with Paragraph 27. The parties shall be entitled to seek fees and costs incurred in any such motion. Any fee determination by the Court shall be governed by the provisions set forth in Section 505(d) of the Clean Water Act, 33 U.S.C. §1365(d) and applicable case law interpreting such provision.

MISCELLANEOUS PROVISIONS

12. This Consent Decree was entered by the parties as a settlement of disputed matters, and neither this Consent Decree nor any action taken pursuant to it shall be construed as an admission of any fact or liability, either expressed or implied; and this Consent Decree shall not be offered by the parties hereto or any other person as evidence of any alleged fact or liability, nor entered in any legal or administrative proceeding for any purpose other than to enforce the terms hereof.

13. The Term of this Consent Decree shall be two (2) years after the Effective Date.

14. This Consent Decree shall be binding on the parties and on their respective successors and assigns.

15. This Consent Decree may be executed in one or more counterparts which, taken together, shall be deemed to constitute one and the same document.

16. Nothing in this Consent Decree shall be construed to limit in any way Bond's obligations under any federal, state, or local law or regulation governing any activity required by this Consent Decree.

17. In the event that any of the provisions of this Consent Decree is held by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely affected, provided the Consent Decree does not thereby fail of its essential purpose, in which case the parties may move the Court to amend the Consent Decree to accomplish as closely as practicable the parties' initial intents and purposes.

18. The language in all parts of this Consent Decree, unless otherwise stated, shall be construed according to its plain and ordinary meaning.

19. The undersigned are authorized to execute this Consent Decree on behalf of their respective parties and have read, understood and agreed to all of the terms and conditions of this Consent Decree.

20. All agreements, covenants, representations and warranties, express or implied, oral or written, of the parties concerning the subject matter of this Consent Decree are contained herein. This Consent Decree and any attachments are made for the sole benefit of the parties, and no other person or entity shall have any rights or remedies under or by reason of this Consent Decree, unless otherwise expressly provided for therein.

21. The parties expressly understand and agree that each party has freely and voluntarily entered into this Consent Decree with and upon advice of counsel.

22. This Consent Decree and any attachments contain all of the terms and conditions agreed upon by the parties relating to the matters covered by the Consent Decree, and supersede any and all prior and contemporaneous agreements, negotiations, correspondence, understandings, and communications of the parties, whether oral or written, respecting the matters covered by this Consent Decree. This Consent Decree may be amended or modified only by a writing signed by the parties or their authorized representatives, followed by order of the Court adopting such change.

23. Any notices or documents required or provided for by this Consent Decree or related thereto that are to be provided to Clean Water Action pursuant to this Consent Decree shall, unless otherwise provided in this Consent Decree, be sent via electronic mail to nchorover@choroverlaw.com and _compliance@cleanwater.org.

Any notices or documents required or provided for by this Consent Decree or related thereto that are to be provided to Bond pursuant to this Consent Decree shall, unless otherwise provided in this Consent Decree, be sent via electronic mail to ChrisMyhrum@myhrumlaw.com

With a copy to:

karenhubacz@bondsandandgravel.com

Each party shall notify the other parties of any change in their contact information within fourteen (14) days of any such change.

24. Bond does not, by entering into this Consent Decree, waive any defenses or rights with respect to any allegation or claim asserted by anyone, including Clean Water Action, of any kind or nature arising or alleged after the date Bond signs this Consent Decree, and Bond does not waive any defenses or rights with respect to any allegation or claim which may be asserted by EPA or the Commonwealth of Massachusetts.

25. Signatures of the parties transmitted by facsimile or electronic mail are binding.

26. If for any reason the Court should decline to approve this Consent Decree in the form presented, the Consent Decree shall be null and void and the parties agree to work together in good faith to attempt to agree on modifications to this Consent Decree within thirty (30) days to make it acceptable to the Court.

27. This Court shall retain jurisdiction over this matter and allow this action to be reopened for the purpose of enabling the parties to this Consent Decree to apply to the Court for any further order that may be necessary to construe, carry out, enforce compliance and/or resolve any dispute regarding the terms or conditions of this Consent Decree.

Clean Water Action

By:  Dated: March 28, 2016

Bond Construction Corporation

By: _____ Dated: _____

APPROVED:

United States District Judge

27. This Court shall retain jurisdiction over this matter and allow this action to be reopened for the purpose of enabling the parties to this Consent Decree to apply to the Court for any further order that may be necessary to construe, carry out, enforce compliance and/or resolve any dispute regarding the terms or conditions of this Consent Decree.

Clean Water Action

By

Dated:

Bond Construction Corporation



Dated



APPROVED

United States District Judge